No. 14-1406

In The
Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

If the members of late nineteenth-century Congress could peer into the future and see the fate of the disputed area over the next 130 years, they would be unsurprised to find that the land was populated almost exclusively by non-Indians (over 98%) and that the State of Nebraska had consistently and exclusively exercised criminal and civil jurisdiction over the area. This is true because they would see that their expectation and goal to end the Reservation status of this land had been realized by the early 1900s as almost all the land quickly sold to non-Indian settlers. To the contrary, the members of Congress would no doubt be *very* surprised to learn that the Omaha Tribe and United States government now claimed the land west of the railroad right-of-way still remained part of the Reservation. This reality must inform the Court's diminishment analysis.

This Court should once and for all resolve that the Omaha Reservation was diminished in 1882 and the land at issue in this case is not part of the Reservation. Both this Court's precedent and practical realities demand this result because the disputed area does not have, and has never had, any Indian character, there has never been any federal or tribal presence on the land, and the State of Nebraska has dominated the jurisdictional history of the area, as all governmental services are provided by the State and local agencies.

The 1882 Act, viewed in historical context, indicates that Congress intended to diminish the

Reservation. Indeed, the events surrounding the 1882 Act reveal that everyone – Congress, the Tribe, and the Executive Branch – intended to separate and segregate the western land from the Reservation and relinquish it to the State of Nebraska. The historical and current demographics, land ownership, and assumption of uninterrupted jurisdiction by state and local authorities all confirm this occurred.

This history has "created justifiable expectations," *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977), among those who have ordered their lives based on the treatment of the land by authorities at all levels of government. A conclusion that this land should return to the Reservation would greatly disturb these expectations. To the contrary, if the Court determines that the Omaha Reservation was diminished in this case, ***nothing will change*** and the historical status quo will remain undisturbed.

ARGUMENT

I. DIMINISHMENT SHOWN BY: (1) NO INDIAN CHARACTER, (2) NO TRIBAL OR FEDERAL PRESENCE, AND (3) STATE OF NEBRASKA'S UNINTERRUPTED ASSERTION OF JURISDICTION.

As this Court stated in *Solem*, and reiterated in *Hagen v. Utah*, 510 U.S. 399 (1994), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), and *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*,

544 U.S. 197 (2005), when an area "has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem v. Bartlett*, 465 U.S. 463, 471 (1984). The "subsequent demographic history of opened lands" is an "additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471-72. Thus, "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation. . . ." *Id.* As this Court emphasized in *Rosebud*:

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977).

Nevertheless, Respondents strain to urge the Court to disregard these principles and ignore the jurisdictional history and demographic history of the disputed area. U.S. Br. 28; Omaha Tribal Council ("OTC") Br. 24, 43-44. The Tribe asserts that because "statutes are to be construed liberally in favor of the Indians," "courts cannot . . . [rely] on post-enactment evidence as an indicium of congressional intent." OTC Br. 24. This assertion is wrong and contradicts the

framework set forth by *Solem*. *Solem* explained that "in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue," "[r]esort to subsequent demographic history" for statutory interpretation, "is a ***necessary expedient***." *Solem*, 465 U.S. at 471-72 nn.12 & 13 (emphasis added). In contrast, Respondents advance the proposition – erroneously adopted by the courts below – that analyzing demographic factors amounts to "unnecessary surplus." Pet. App. 7.

Here, the disputed area does not have and *never* has had any Indian character. J.A. 657. Since 1900, as confirmed by the official censuses, over 98% of this land's population has always been non-Indian. J.A. 208, 366. After over a century, the total number of Indians residing in the disputed area is 21 people, which is only 9 more than the initial census data of 12 Indian residents in 1900. J.A. 366. More than 98% of the land in the area was conveyed from the United States to non-Indians. J.A. 204, 350. These statistics are more overwhelming and compelling than the four cases where this Court found diminishment. See *Yankton Sioux*, 522 U.S. at 356-57 (two-thirds of the population was non-Indian and over 90% of the reservation lands were in non-Indian lands); *Hagen*, 510 U.S. at 421 (involved land that was "over 90% non-Indian both in population and in land use"); *Rosebud Sioux*, 430 U.S. at 605 (involved land that was "over 90% non-Indian both in population and in land use"); *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975) (approximately 90% of the population was

non-Indian and collectively owned approximately 85% of the land); *contra Solem*, 465 U.S. at 480 (finding no diminishment where the overall population of the land was evenly divided between Indians and non-Indians). Contrary to the Tribe's brief, there are no "ever-shifting demographic trends" here. OTC Br. 53. A percentage change in the Indian population from 0.27% to 0.83% over a century is not an "ever-shifting demographic trend." J.A. 366. Rather, it shows the legal conclusion that there is and has been no Indian character in the disputed area since it was opened for settlement.

Regarding jurisdictional authority, the record shows that the Tribe admitted that, "[w]est of the railroad right of way, *all* governmental services are provided by state and local agencies, not by the Omaha Tribe." ECF Doc. 138, 15, ¶ 147, *Smith v. Parker*, 07-cv-3101 (D. Neb. Aug. 29, 2013) (emphasis added). The Tribe admitted by joint stipulation that the Tribe has no office, operates no schools, industries, or businesses in the disputed area and has conducted no governmental or ceremonial activities there. J.A. 216.[1] The Tribe does not offer foster care,

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[1] The United States incorrectly attempts to invent tribal authority in the area by highlighting that at one time or another a tribal member served as Mayor of Pender, Surveyor of Thurston County, Justice of the Peace, County Attorney, or County Judge. U.S. Br. 45. Contrary to the United States' position, this only shows that a tribal member exercised the authority *of the State of Nebraska* and its municipalities – and the corresponding recognition of the governmental authority of the

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medical, welfare, or child protective services in the disputed area. *Id.* The Tribe has no mineral rights or other claims to land in the disputed area. J.A. 227-33; *cf. Solem*, 465 U.S. at 474. Before 2006, and the imposition of the liquor tax scheme which triggered this litigation, the Tribe stipulated that it never enforced tribal ordinances in the disputed area. J.A. 215-16. The complete absence of Indian character or Tribal presence, combined with the State of Nebraska's consistent assertion of jurisdiction, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421.

Contrary to what the Omaha Tribe *of today* suggests in its brief, the demographic and jurisdictional history of the disputed area is not a case of "adverse possession or inadvertent loss of sovereign territory." OTC Br. 24. Rather, Congress separated this portion from the Reservation in 1882 *at the Tribe's repeated requests* for over a decade. J.A. 194, 201, 332, 419, 424, 469, 628-30, 636. The Tribe then further expressly consented to the 1882 Act. J.A. 345, 466. The Act of 1882 was the Congressional culmination of the Tribe's requests.

Post-diminishment confirmation "[i]n the years immediately following the opening," *Solem*, 465 U.S. at 471, is shown by official pronouncements in U.S.

State of Nebraska by a member of the Tribe. It does not change the demographics of the number of Indians residing in the disputed area.

government reports and publications clearly and objectively reflecting the diminishment. Reply Br. App. 1a (1883, 1888, and 1892 BIA maps);[2] J.A. 206-07 (1884, 1888, 1898, 1900, 1906, 1909, and 1911 OIA acreage reports); Pet. Br. 34-35.

Here, the land west of the right-of-way was almost entirely sold off to non-Indian settlers by 1919. J.A. 206, 360. All but a few allotments and partial allotments were sold to non-Indians fifteen years before Congress rejected its policy of encouraging surplus land sales and allotments by passing the Indian Reorganization Act, 48 Stat. 984 *et seq.* (1934). Indeed, in 1935, soon after Congress passed the Indian Reorganization Act, the Winnebago Agency issued its Annual Statistical Report stating the total area of the original Reservation was reduced by the sale of 50,157 acres of land west of the railroad right-of-way. J.A. 208, 541.

Non-Indians have consistently, and almost exclusively, resided and worked upon this land continuously since 1882. *Solem*, 465 U.S. at 471. It is their "justifiable expectations," developed over the last 130 years,

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[2] Petitioners urge the Court to give particular attention to these maps, detailed versions of which Petitioners have included in this reply for the Court's ease of review. It is evident that the Bureau of Indian Affairs – in official maps compiled under the direction of the Commissioner and published in only the first decade following the 1882 Act – drew Pender (reflected as the unlabeled county seat circular marker next to the "P" in "La Porte" in the 1888 and 1892 maps, respectively) *outside* the Reservation's new western boundary, the Sioux City and Nebraska Railroad.

which will be materially disrupted if the Tribe, with the wholesale support of the United States government, is allowed to restore reservation status to the disputed area. The practical result would be that the Tribe would preside over an area owned and virtually entirely populated by non-Indians and over which the Tribe has no governmental, law enforcement, or regulatory presence whatsoever. Simultaneously, State and local authority would be curtailed despite the fact that this area has solely been the concern and responsibility of these governments, not the Tribe or federal government.

After over 130 years of their documented inaction in the disputed area, Respondents cling to the following alleged inconsistencies to support their position that overwhelming evidence of *de facto* diminishment should be ignored. An analysis of each one further shows the weakness of the Respondents' arguments.

1. *Tribal Agreements*. The Tribe correctly notes that Nebraska law permits public agencies to contract with tribal governments to perform government services. OTC Br. 52; Neb. Rev. Stat. § 13-1503. Petitioners agree with the Tribe that cooperation and coordination of services *on the Reservation* should be encouraged. However, the Tribe omits a significant fact. The 130 years of government services provided by the State and local governments in the disputed area were not provided as part of agreements with the Tribe regarding the Reservation. They were provided by the State and local governments to the disputed area just as they would be to any other off-reservation area. The Tribe admitted in the district

court that "[w]est of the railroad right of way, all governmental services are provided by state and local agencies, not by the Omaha Tribe." ECF Doc. 138, 15, ¶ 147, *Smith v. Parker*, 07-cv-3101 (D. Neb. Aug. 29, 2013).

On the few occasions when the State entered into cooperative agreements with the Tribe regarding on-reservation activity, the Tribe tries to expand the terms of these agreements, for purposes of this litigation, beyond the boundaries of the Reservation. OTC Br. 51 (claiming the motor fuel tax agreement "covered lands west of the right-of-way, including Pender"). Even the United States acknowledges that those agreements are not so expansive. U.S. Br. 50-51 ("The agreement applies only to sales 'within the boundaries of [the Omaha] Reservation,' J.A. 1150, although it does not specify those boundaries.").[3]

2. *Revenue Rulings*. Respondents try to rely on Nebraska's rescinded revenue rulings. U.S. Br. 49-50; OTC Br. 51. Not only do these revenue rulings not include any historical or legal jurisdictional analysis of the Reservation's boundaries, or even purport to, but Respondents fail to mention that each revenue

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[3] The Tribe makes a similar unsupported claim that a cross-deputization agreement between the State and the Tribe included Pender. OTC Br. 51. Similar to the motor fuel tax agreement, the cross-deputization agreement was for "law enforcement on the reservation" and did not specify the Reservation boundaries. J.A. 219-20.

ruling cited was either superseded or rescinded. See Pet. Br. 17, n.2.

3. *Lamplot v. Heineman*. Respondents selectively quote one portion of one brief in *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. 2006), out of context, to claim the State acknowledged Pender lies within the Reservation's boundaries. U.S. Br. 51; OTC Br. 51. But they conveniently fail to mention the procedural context of the *Lamplot* brief. The State, by its filings, was informing the district court in *Lamplot* that the Tribe was an indispensable party in that litigation. The State specifically clarified in *Lamplot* that it was attempting "to illustrate the problems with attempting to resolve [the *Lamplot*] case without the participation of the Omaha Tribe, not to suggest that Pender, Nebraska lies within the Omaha Tribe's reservation." ECF Doc. 31, 2, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. Oct. 23, 2006). "The State has not argued that Pender, NE is within the Omaha Tribe's reservation boundaries, nor will it do so." *Id.*

4. *United States' 2012 Post-Litigation Flip*. In order to support its position the Reservation was not diminished, the United States relies on a 2008 letter and 2012 memorandum, created in response to a request for litigation assistance from the Tribe. J.A. 1196 (stating "[y]our letter implicitly requests reconsideration of the 1989 opinion issued by this office" as part of the "Omaha Tribe request for Attorney Fees"). Far from serving as confirmation the Reservation has not been diminished, as the United States asserts, U.S. Br. 46, the 2012 retraction of the 1989 opinion

merely shows the post-litigation change of position by the United States.

The few alleged inconsistencies identified by Respondents immediately after diminishment are refuted by the record. See, *e.g.*, U.S. Br. 41-42 (incorrectly claiming cited statements from federal government officials were not in the record and suggesting acreage reports only refer to land occupied by the Tribe); *cf.* J.A. 204-08 (stipulating to officials' statements and stipulating disputed area was not included as part of Reservation acreage reports). The United States selectively quotes subsequent Omaha and Winnebago Agency reports, U.S. Br. 40, while omitting the parts of those reports excluding the disputed area from the boundary description and from the Reservation's total acreage. J.A. 496 (1885 Report stating, "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad . . . "); J.A. 798-99 (1890 Report excluding portion sold and identifying total acreage as 133,840 acres); J.A. 817 (1892 Report excluding portion sold and identifying total acreage of both reservations as 245,200 acres); J.A. 830 (1897 Report excluding portion sold and identifying total acreage as about 133,000 acres); J.A. 1100 (1899 Report identifying total acreage as about 140,000 acres); J.A. 547-49.[4]

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[4] Apparently recognizing these subsequent agency reports support diminishment, the Tribe instead argues these reports are evidence of the BIA taking action to "dismantl[e] Congressional intent." OTC Br. 49. The only cited basis for the Tribe's assertion

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These perceived inconsistencies, some of Respondents' own recent and self-serving creation, do not serve as compelling official acknowledgment of nondiminishment. Nor do they create a record "so rife with contradictions and inconsistencies as to be of no help to either side." *Solem*, 465 U.S. at 478.

Instead, the State of Nebraska "dominated the jurisdictional history," *Solem*, 465 U.S. at 479, of the disputed area. The Tribe admits that west of the railroad right-of-way, ***all*** governmental services are provided by State and local agencies, not by the Tribe. And in *Rosebud Sioux* this Court stated that "the single most salient fact is the unquestioned actual assumption of state jurisdiction over the [area]." *Rosebud Sioux*, 430 U.S. at 603.

The United States' arguments, in an impressive flip-flop, also depart from its position in *Solem*. In *Solem*, the United States argued as follows:

> There is a final caveat. In cases where the opened area of a Reservation was entirely – or almost entirely – sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is it an impermissible attempt to construe turn of the century

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are unsupported statements by the Tribe's hired expert. J.A. 951.

> legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area if and when their expectations were fully realized, but not otherwise. Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few setters had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

Brief for United States as Amicus Curiae 34-37, *Solem v. Bartlett*, No. 82-1253, 1983 U.S. S. Ct. Briefs LEXIS 477.

Exactly so. And as the United States further explained, this Court's precedents fully supported that reasoning.

> All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. And, today, more than 90% of the opened area is non-Indian, both in population and land use. In these circumstances, it was obviously difficult to

> conclude that Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.

Id. The United States now appears to favor the view that the tail can and should wag the dog.

For over a century, State and local governments have relied on the 1882 Act, and the actions and/or inaction taken by the Tribe and United States, in asserting their own civil and criminal jurisdiction in the disputed area.[5] Notably, Respondents' recent effort to assert jurisdiction in the disputed area is not a comprehensive plan to administer a broad array of government services in and around Pender, but rather an isolated attempt to derive revenue from the sale of alcohol at Pender's liquor retailers and bars. In service of that goal, Respondents ask this Court to rewrite history so as to "rekindl[e] embers of sovereignty that long ago grew cold." *City of Sherrill*, 544 U.S. at 215. Their invitation should be declined.

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[5] The United States does not mention that not only was the federal indictment of tribal member Damon Picotte dismissed, U.S. Br. 52, but the federal judge ordered dismissal *at the request of the federal prosecutor so that he could be "released by the U.S. Marshal to the detainer of the Thurston County Sheriff's Office to be tried on the charge of murder," for a murder committed in Pender. United States v. Picotte*, Docket Entry 17, 8:99-cr-00159-JFB (D. Neb.) (dismissed Oct. 6, 1999) (emphasis added); J.A. 145-52. Picotte remains in a Nebraska prison serving his 30 to 45 year sentence for his state conviction of second degree murder. Pet. Br. 16.

II. DIMINISHMENT SHOWN BY THE 1882 ACT IN ITS HISTORICAL CONTEXT.

This Court has repeatedly emphasized that "explicit language of cession and unconditional compensation are **not prerequisites** for a finding of diminishment." *Solem*, 465 U.S. at 471 (emphasis added); *accord Hagen*, 510 U.S. at 411 ("[W]e have never required any particular form of words before finding diminishment."). In fact, "the notion that [clear language of express termination] is the only method by which congressional action may result in disestablishment [or diminishment] is **quite inconsistent**," *Rosebud Sioux*, 430 U.S. at 588 n.4 (emphasis added), with the "traditional approach to diminishment cases, which **requires** [courts] to **examine all the circumstances surrounding the opening of a reservation**." *Hagen*, 510 U.S. at 411 (emphasis added).

Despite these clear directives, Respondents argue that the absence of words of cession or provisions for payment of a sum certain in the 1882 Act are fatal to Petitioners' position. U.S. Br. 27-28; OTC Br. 17. Just as this Court has rejected that argument in the past, the Court should again reject it.

In *Hagen*, this Court utilized the "traditional approach to diminishment cases, which requires us to examine all the circumstances surrounding the opening of a reservation" to conclude Congress diminished the Uintah Reservation despite the operative statutes not including express language of cession. *Hagen*, 510 U.S. at 411-22. Justice Blackmun recognized this in his dissent in *Hagen*, stating, "[t]he Court relie[d] on

a single, ambiguous phrase [(return to the public domain)] in an Act that never became effective, and which was deleted from the controlling statute, to conclude that Congress must have intended to diminish the Uintah Valley Representative." *Id.* at 422 (Blackmun, J., dissenting).

Similarly, in *Rosebud Sioux*, this Court concluded that at least two acts devoid of cession language diminished portions of the Rosebud Sioux Reservation. *Rosebud Sioux*, 430 U.S. at 612-13, 615 (concluding that like the 1904 Act, the 1907, and 1910 Acts diminished separate and geographically distinct portions of the reservation). Under Respondents' interpretative approach, it is difficult to imagine this Court would have found diminishment intent in *Hagen* and *Rosebud Sioux*.

Contrary to Respondents' claim that the acts in prior cases that did not diminish reservations are virtually identical to the 1882 Act, there are critical differences between the 1882 Act and the surplus land acts at issue in *Solem*, *Mattz v. Arnett*, 412 U.S. 481 (1973), and *Seymour v. Supt. of Wash. State Pen.*, 368 U.S. 351 (1962). As discussed in greater detail in the opening brief, Congress enacted the surplus land acts in all of these cases after the 1887 Dawes Act, whereas the 1882 Act predated the Dawes Act. Pet. Br. 43-44. This is significant because instead of creating a checkerboard pattern of land ownership, Congress sought to sell to non-Indian settlers land in an area that was "slice[d] off from the reservation."

Wisconsin v. Stockridge-Munsee Cmty., 554 F.3d 657, 663 (7th Cir. 2009).

Relatedly, unlike the 1882 Act, the post-Dawes Act legislation analyzed in *Mattz* and *Seymour* did not open for settlement and sale a specific portion of the tribes' reservations, but instead the entirety of those reservations. *Mattz*, 412 U.S. at 483; *Seymour*, 368 U.S. at 354-55. The issue in *Mattz* and *Seymour* was whether the reservations were entirely *disestablished*, not whether Congress diminished a discrete portion of the reservations. Because the 1882 Act separated a distinct tract of land for settlement by non-Indians, the "checkerboard analysis" of *Mattz* and *Seymour* bears no relevance to the present inquiry.

Several other errors plague Respondents' analysis of the text of the 1882 Act. For example, the Tribe and the United States each emphasize that the 1854 and 1865 treaties with the Omaha Tribe had express cession language, while the 1882 Act did not. U.S. Br. 18; OTC Br. 28-29. This distinction in language is not helpful to understand Congressional intent regarding the reservation boundaries for a surplus land act, rather than a treaty, in which the Congressional concept of land ownership by the Tribe was synonymous with reservation status.

This Court has twice found diminishment when faced with factual scenarios where Congress had previously used hallmark cession language regarding a reservation but did not do so in the surplus land act

at issue. See *Rosebud Sioux*, 430 U.S. at 605-06 (recognizing that the 1904 Act contained cession language, but the 1907 and 1910 Acts did not, and instead of reasoning that the absence of such language in the subsequent acts indicated a change in congressional purpose, concluding that there was "a continuity of intent" through the three acts); *Hagen*, 510 U.S. at 402, 420-22 (recognizing that Congress twice directed the President to appoint a commission to negotiate with Indians for the "relinquishment" and cession to the United States of all unallotted lands, and holding that the 1905 Act without such terms diminished the reservation). *Rosebud Sioux* and *Hagen* show that the distinction in language between the 1882 Act and prior Omaha Indian Treaties is not dispositive nor particularly revealing as to whether Congress intended to diminish the Omaha Reservation in 1882.

Respondents also overemphasize the significance of Congress allowing for Tribe members to select allotments in the disputed area, suggesting that this contradicts a finding of diminishment. U.S. Br. 18; OTC Br. 27. There are many cases in which courts found diminishment even though tribe members were allowed to select allotments on affected land before it was open for settlement and sale. See *Yankton Sioux*, 522 U.S. at 344 (explaining that under the 1894 Act the Tribe would cede all unallotted land); *Hagen*, 510 U.S. at 403-05 (quoting the 1902 Act, which provided an allotment process to tribe members before return of unalloted land to the public domain for sale and

settlement); *Rosebud Sioux*, 430 U.S. at 608 (quoting the statute, which instructed the Secretary of the Interior to sell or dispose of portions of the reservation, except for those that had been, or would be allotted to tribe members).

Regardless, the historical record here is clear that Congress did not expect many, if any, Indians to select land west of the right-of-way. J.A. 198-99, 201-02. The 1882 Act was crafted in such a fashion that once the allotment selections were made, it was closed off to further Indian settlement. J.A. 348-49; C.A. App. 1069-71. This reinforces that in 1882, Congress envisioned that the land west of the right-of-way would remain primarily non-Indian, in contrast to the eastern portion, which would remain a part of the Reservation.

III. EVENTS SURROUNDING THE 1882 ACT REVEAL A WIDELY HELD CONTEMPORANEOUS UNDERSTANDING THAT THE RESERVATION WOULD SHRINK.

Respondents imply that the 1882 Act arose in a historical vacuum. It did not. Events surrounding the 1882 Act's passage, and subsequent understanding of its effects, confirm a widely held understanding the Reservation would shrink.

Respondents urge this Court to impose an impossible standard on Petitioners to show that the events surrounding the 1882 Act reveal a widely held contemporaneous understanding that the Reservation

would shrink because of Congress's action. On one hand, Respondents contend there is an "absence of any discussion of diminishment," U.S. Br. 31, or at most, "snippets" and "scraps" of evidence. OTC Br. 18-19. On the other hand, when Petitioners highlight evidence revealing that the United States and the Tribe understood the 1882 Act would diminish the Reservation, Respondents demand that the Court ignore it, contending that statements referencing "diminishment" are irrelevant, U.S. Br. 36, and that it is improper to consider Congress's understanding of the legal effect of the Act upon the land when analyzing the 1882 Act's purpose. U.S. Br. 33 & n.5. An examination of "all the circumstances" does not mean the Court should ignore evidence that reveals a contemporaneous understanding that the 1882 Act would diminish the Reservation.

The circumstances surrounding the 1872 and 1882 Acts show both Congress and the Tribe intended to diminish the Reservation for over a decade. The western portion of the Reservation, far removed from the Missouri River, had no Indian character and it is unsurprising that in 1871, when the Tribe needed funds, its leaders sought to separate and sell the *uninhabited* western portion of the Reservation. J.A. 194. Acting on the Tribe's request, Congress enacted legislation in 1872 authorizing the Secretary of the Interior, *with the consent of the Tribe*, to separate and sell this land. J.A. 194. While the sale associated with

the 1872 Act was ultimately unsuccessful,[6] the Tribe continued to try to have Congress separate the unused western portion of the Reservation.

In 1882, again at the Tribe's request, the Congressional history shows that Congress agreed to "break[ ] up that portion of the reservation which is to be sold" and "segregate[ ]" the lands occupied by the tribe members. J.A. 647 (statements by Senate member of the Committee that sponsored the Act). Tribal members understood that after this requested separation, the right-of-way would become the new boundary of the reservation. "[T]he white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to

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[6] Respondents make much of the fact that Petitioners have never claimed the 1872 Act worked to diminish the Reservation, arguing that if the 1872 Act did not diminish, then surely the 1882 Act did not either. U.S. Br. 21-22; OTC Br. 18. This is easily explained. Quite simply, the 1872 Act did not diminish the Reservation (though Congress intended it to) because the sale of land was unsuccessful. As the United States acknowledged in *Solem*, it is reasonable to "suppose that the sponsors of 'opening up' legislation would have intended to end the Reservation status of the affected area if and when their expectations were fully realized, but not otherwise." Brief for United States as Amicus Curiae 34-37, *Solem v. Bartlett*, No. 82-1253, 1983 U.S. S.Ct. Briefs LEXIS 477. Because Congress's expectations for the 1872 Act were not initially realized, it is reasonable to conclude diminishment did not occur solely as the result of that Act. However, Congress's expectations for the 1872 and 1882 Acts collectively were ultimately fully realized when the entirety of the non-allotted portion of the disputed area was sold pursuant to the 1882 Act.

the railroad from the east and get the benefit of these improvements." J.A. 201, 726. Senator Dawes explained: "The Indians as a tribe consent. This bill goes upon the theory that the Indians as a tribe consent to part with fifty thousand acres of their land." J.A. 466.

Prominent members of Congress also understood that the 1882 Act would reduce the Reservation. J.A. 644 (Senator Saunders: "fifty thousand acres, to be taken from the west part of the reservation"); J.A. 647 (Senator Ingalls: "breaks up that portion," "segregated from the remainder of the reservation," and "jurisdiction of the United States is absolutely relinquished"); J.A. 683 (Senator Dawes: "When this bill came in I was troubled lest the sale of 50,000 acres would leave the reservation too small. . . . I was assured that it would leave an ample reservation . . . "); J.A. 711 (Representative Haskell: "the total amount of land belonging to this reserve . . . after this sale, when the allotments are provided for, 143,000 acres"). As demonstrated by these comments and others highlighted in the opening brief, there was a widely held contemporaneous understanding that the 1882 Act would alter the boundaries of the Reservation.

Because of this legislative history, Respondents attempt to inject the illusion of ambiguity by claiming Congress's own treatment of the affected areas in subsequent legislation demonstrated that it understood that the 1882 Act had not diminished the Reservation. U.S. Br. 38-39; OTC Br. 44-46 (citing Act of Aug. 2, 1886, ch. 844, 24 Stat. 214; Act of May 15, 1888, ch. 255, 25 Stat. 150; Act of Aug. 19, 1890, ch.

803, 26 Stat. 329; Act of Aug. 11, 1894, ch. 255, 28 Stat. 276; Act of May 6, 1910, ch. 202, 36 Stat. 348). The Court should reject this argument because the language utilized by Congress was merely descriptive and reflects that Congress sought to ensure the 1882 Act was a success and accomplished the goal of selling the land west of the railroad right-of-way. *Hagen*, 510 U.S. at 415 (finding the extension of deadlines in later acts were "so that the 'purposes' of the [earlier act] could be carried out"). And it stands to reason that Congress would seek the Tribe's consent before extending the payment terms considering Congress had obtained the Tribe's consent at the outset and given the Tribe's pecuniary interests in the payment scheme. Moreover, the references to the Reservation were "merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905." *Hagen*, 510 U.S. at 420. As in *Hagen* and *Rosebud Sioux*, 430 U.S. at 630 & n.21 (Blackmun, J., dissenting) (explaining there were instances where subsequent legislation referred to the Rosebud Reservation in the present tense), the Court should not allow these passing references to alter its diminishment inquiry.

The bottom line is that from 1872 through 1882, everyone – Congress, the Tribe, and the Executive Branch – intended to separate and segregate the western land from the remainder of the Reservation with the right-of-way as the new western boundary. The historical and current demographics, land ownership, and immediate assumption of uninterrupted jurisdiction by state and local authorities show they

accomplished this objective. This Court's conclusion here must reflect this on-the-ground reality.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted this 13th day of January, 2016.

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Enlarged image from 1883 Bureau of Indian Affairs Map of U.S. Indian Reservations, J.A. 1298

Enlarged image from 1888 Bureau of Indian Affairs Map of U.S. Indian Reservations, J.A. 1299

Enlarged image from 1892 Bureau of Indian Affairs Map of U.S. Indian Reservations, J.A. 1300